

Service Date: March 3, 1976

DEPARTMENT OF PUBLIC SERVICE REGULATION  
PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

IN THE MATTER OF the application of	)	UTILITY DIVISION
MONTANA-DAKOTA UTILITIES CO.,	)	
for authority to establish increased	)	DOCKET NO. 6277, 6342 & 6343
rates for electric and gas service.	)	ORDER NO. 4245
	)	
	)	

ORDER GRANTING TEMPORARY APPROVAL OF INCREASED OF ELECTRIC AND  
NATURAL GAS RATES AND CHARGES, PENDING FINAL DECISION, AND SUBJECT  
TO REBATE

FOR THE APPLICANT:

APPEARANCES

Henry Loble, Lester H. Loble, II, attorneys for the applicant; Montana-Dakota Utilities Company,  
400 North Fourth Street, Bismarck. North Dakota 58501

FOR THE PROTESTANTS AND INTERVENORS:

Geoffrey L. Brazier, Montana Consumer Counsel, 330 Fuller Avenue, Helena, Montana

William E. O'Leary, attorney at law, and George F. Hess, for the Montana Consumer Counsel

Jerome Anderson, attorney at law, Fred A. Haddenhorst and Gary Johnson, for Gary Operating  
Company, 4 Ivermess Court East, Englewood, Colorado

C. W. Leaphart, Jr., attorney at law, and Earl Moon, for The Great Western Sugar Company,  
P. O. Box 5308, Denver. Colorado

John Badger, attorney at law, R. B. Blomeyer R. R. Fritz, for Continental Oil Company, P. O.  
Box 2197, Houston. Texas

FOR THE COMMISSION:

Russell L. Doty, Jr., attorney at law, Dr. J. W. Wilson and Dr. E. Jeffery Livingston, for the Staff  
of the Montana Public Service Commission.

BEFORE:

Gordon E . Bollinger, Chairman  
P. J. Gilfeather, Commissioner  
Thomas G. Monahan, Commissioner  
George Turman, Commissioner

FINDING OF FACT

1. On April 15, 1975, Montana-Dakota Utilities Co., (MDU) filed herein its application for increased rates and charges for electric and natural gas service. Thereafter, pursuant to order of the Commission, the said application was set down for hearing. After requisite notice was given and had, hearings on said application were held as follows:

- A. From the 21st day of September, 1975, through the 29th day of September, 1975, in Helena, applicant's case was presented.
- B. From the 1st day of December, 1975, through the 12th day of December, 1975, in Helena, the intervenors and Commission staff presented their cases. Thereupon all parties rested, all dockets were closed and the case was submitted to the Commission for decision. Original briefs in Docket No. 6277 are due 30 days after receipt of the transcript with answer briefs due 20 days thereafter.
- C. "Satellite" hearings were held from the 15th day of December, 1975, to the 19th day of December, 1975, in various communities in Montana where the public was afforded an opportunity to express its views.
- D. In Docket No. 6342 (Gary Operating Company all briefs have been submitted and the matter is pending final decision by the Commission. In Docket No. 6343 (Great Western Sugar Company) the requirement for submission of briefs has been placed in abeyance at the request of the parties.

2. On the 2nd day of February, 1976, by written motion duly filed herein, MDU moved for temporary approval of increases of electric and natural gas rates and charges, pending the final decision of this Commission and subject to rebate.

Said motion was made pursuant to the provisions of Section 70-113, R.C.M.

1947. After duly considering said motion, and the record before this Commission. in Docket No. 6277 including the testimony and evidence, oral and written, of the applicant, staff and protestants now makes the following additional findings of fact, conclusions of law and temporary order:

3. MDU is a public utility serving customers within the State of Montana with natural gas and electric service. MDU's rates for natural gas and electric service are subject to the jurisdiction of this Commission.

4. All witnesses for Consumer's Council and staff, who testified and presented evidence concerning revenue requirements, conceded that some increased revenues for MDU's electric and natural gas service were justified.

5. Applicant contends that its future rates of return under existing rates are set forth in Exhibits J-2 and K-2 filed by MDU with its application of April 15, 1975. These exhibits project a rate of return under existing rates on the gas utility operation of 3.91 percent for the year 1975 and 2.89 percent for the year 1976 (Exhibit K-2) and that on the electric utility operation under existing rates it would receive a rate of return of 4.54 percent for 1975. and 4.17 percent for 1976 (Exhibit J-2) . Applicant contends that such rates are unjust and unreasonable and too low.

6. The application of MDU was based upon the supposition that rates would be effective on July 1, 1975, for natural gas rates. The electric rates applied for were to be implemented in three equal steps on July 1, 1975, January 1, 1976, and July 1, 1976.

7. If MDU had been granted its application for rate relief, it would have received additional revenues as follows:

	1975	1976
Gas Utility	\$1,568,568	\$3,137,137
Electric Utility	490,535	3,200,316

8. MDU has requested increased annual revenues for the electric utility of

\$3,675,707. The Company has also requested increased natural gas revenues of \$3,137,137 on an annual basis.

9. Consumer Counsel witness determined that MDU should have additional annual revenues as follows:

Gas Utility	\$2,017,000
Electric Utility	\$1,714,000

10. The industrial sales and interdepartmental sales for test year 1974, were for 521 cents per mcf at 15.025 psia. Increasing this price for industrial and interdepartmental natural gas to 70 cents per mcf reduces the Company's revenue requirement of \$2,017,000 by \$1,551,000, leaving a deficit of \$466,000 on an annual basis to be made up by residential and nonresidential customers .

#### CONCLUSIONS OF LAW

1. This Commission has a duty to insure that utilities under its jurisdiction, including MDU, furnish reasonable adequate service and facilities to the public at just and reasonable rates. Every unjust and unreasonable rate is prohibited and unlawful. (Section 70-115, R.C.M. 1947)

2. This Commission is required to hold hearings on applications for increases in rates under the requirements of the Montana Administrative Procedure Act and the notice requirements thereof. This Commission has complied with those requirements.

3. Pending a final decision in this proceeding, this Commission may temporarily approve an increase in rates and charges for electric and natural gas service, with the additional revenues collected subject to rebate. (section 70-113, R.C.M. 1947)

4. The record demonstrates that some relief is proper although this Commission has not made its final ratemaking decision on the magnitude and extent of such revenue relief. (Section 82-4216 (7) (e) and Section 82-4209 (7), R.C.M. 1947)

5. In view of the reliable, probative and substantive evidence on the record, a temporary increase in the rates charged for natural gas and electric service is justified to insure continued service to applicant's customers, but amounts above what are granted are not just and reasonable on a temporary basis and would be in violation of the due

process clause of the Fourteenth Amendment to the United States Constitution because it would confiscate ratepayers' property in an arbitrary and capricious manner.

In granting this temporary increase, the Commission in no way subscribes to the contention made by applicant that a denial of any relief pending final determination would be confiscation. Indeed, the law is to the contrary in that a utility does not experience a denial of due process caused by the regulatory lag in the time taken to hear a case.

For example, the United States Supreme Court has ruled that the fact that the time consumed in the course of proceedings in a railroad reorganization imposing substantial losses upon the bond holders does not violate 5th Amendment guarantees against the taking of property without just compensation, if such losses are not taken into account in the price to be paid by a merged railroad acquiring the debtor's assets, since the nature of the public utility makes the bond holders' position subordinate to the public interest. *ReNew Haven Inclusion Cases*, 399 U.S. 392, 26 L. Ed. 2d 691, 90 S.Ct. 2054 86 P.U.R.3d 209 (1970) . See also *Alabama Public Service Comm'n. v. Southern Railroad Co.*, 341 U.S. 341, 95 L.Ed. 1002, 71 S.Ct. 762 (1951); and *Chesapeake & Ohio R.Co. v. Public Service Comm'n of West Virginia*, 242 U.S. 603, 608, 61 L.Ed. 520, 37 S.Ct. 234, 236 (1917) .

The fact that a telephone company was not making a rate of return equal to previously authorized return did not, per se, amount to confiscation of its property in violation of the 14th Amendment, *Mountain States T. & T. Co. v. Public Util. Comm'n, of Colo.*, 345 F. Supp. 80 (3 Judge D. Colo. 1972) That was so even though a rate application had been pending for over six months and the final decision took nine months.

Confiscation does not take place until the utility loses money on its operations as a consolidated entity. The total net income received must be considered in its relation to the total operating experience and return on the entire property in determining whether a rate is confiscatory. *Pudget Sound Traction, Light & P. Co. v. Reynolds*, 244U.S. 574, 61 L.Ed. 1325, 37 S.Ct. 705, P.U.R. 1917 F 59, 63 (1917).

Where a public utility is earning a fair return from all of its operations, the fact

that it may be required to operate one segment at a loss is not an unjust confiscation of its property. *Re Southern Pacific Transport Co.*, Decision No. 82242, Application No. 53666, December 7, 1973, California Pub. Util. Comm'n.

See also *St. Louis & S.F.R. Co. v. Gill*, 156 U.S. 649, 665, 39 L.Ed. 567, 573, 15 S. Ct. 484.

As a matter of law, there is no confiscation here, even if this temporary order is not granted. The utility's own exhibits show a low rate of return--but not a negative one. And, those exhibits may not project revenues in a manner which makes the exhibits useful for comparison with costs--that is revenues may be understated. But, even using the utility's exhibits every part of its regulated operations is operating at a profit and would do so even if this temporary order were not granted.

Even if existing rates did mean confiscation in the long run in this case, confiscation must occur over a longer time than that necessary to complete a ratemaking proceeding--and confiscation cannot be based on what is projected to happen in that short-time period. Indeed, the three-judge Federal Court in *Mountain States'* case found:

There is not the slightest indication in the decisions that confiscation is to be adjudged on any instant basis. *Mountain State T. & T. Co. v. Public Util. Comm'n, of Colo.*, *supra.* at 86.

Since the standard of confiscation is clearly inapplicable, we will follow the standard of granting rates that are just and reasonable and deny part of the temporary rate increase requested as unjust and unreasonable, choosing to follow the recommendation of the Consumer Counsel witness based on the rate of return recommended by the Commission's witness.

6. MDU may be granted a temporary increase of \$2,017,000 for natural gas delivered from and after March 1, 1976, and a temporary increase of \$1,714,000 for electric service delivered from and after March 1, 1976. The natural gas revenues shall come from the following sources: \$466,000 from the residential and non-residential sales and \$1,551,000 from sales to industrial customers and sales and interdepartmental sales.

7. The additional electrical revenues of \$1,714,000 shall be apportioned as outlined in Columns 5 and 6 of Exhibit J-3.

## O R D E R

1. MDU is granted a temporary increase in its rates and charges for natural gas delivered from and after March 1, 1976, of \$2,017,000 on an annual basis; MDU is granted a temporary increase in its rates and charges for electricity delivered from and after March 1, 1976, of \$1,714,000. MDU shall temporarily increase the industrial rate and interdepartmental sales rate to 70 cents per mcf at 15.025 psia, thereby accounting for \$1,551,000 of the temporary natural gas increase. The remaining 546,000 of the temporary natural gas increase shall be applied to all other existing customers natural gas rate structure on a uniform-cents-per-mcf basis. The increase in electrical rates shall be apportioned on the basis of Columns 5 and 6 of Exhibit J-3, and a uniform cents per KWH rate shall be added to the existing rate structures for the various classes of customers. MDU shall file within ten (10) days of this order tariffs reflecting these amounts. This temporary rate structure shall not be binding on the final decision about rate structure in this case.

2. The additional revenues resulting from this temporary approval and interim order shall be subject to rebate plus interest at the rate of return granted to MDU on its capital structure in the final order, if the Commission determines in the final order that lower rates should become effective.

3. This temporary order shall be in effect only until the final decision is made and shall not be in effect during any appeal therefrom.

4. MDU shall begin immediately to develop load factor, cost of service, and other data based on actual MDU system experience necessary to better determine equitable rate design.

DONE IN OPEN SESSION at Helena, Montana, this 13th day of February, 1976.

BY ORDER OF THE PUBLIC SERVICE COMMISSION:

---

GORDON F. BOLLINGER, Chairman

---

P.J. GILFEATHER, Commissioner

---

THOMAS G. MONAHAN, Commissioner

---

GEORGE TURMAN, Commissioner

ATTEST:

GAIL E. BEHAN  
Secretary

(SEAL)

NOTICE:     You are entitled to judicial review of this Order. Judicial review may be obtained by filing within thirty (30) days from the service of this Order, a petition for review pursuant to Section 82-4216, R.C.M. 1947.